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IN THE

Supreme Court of the United States

REPUBLIC OF POLAND and MINISTRY OF STATE TREASURY OF THE REPUBLIC OF POLAND,

Petitioners,

v.

THEO GARB, BELLA JUNGEWIRTH, SAM LEFKOWITZ, PETER KOPPENHEIM, JUDAH WELLER, CHANA LEWKOWICZ, SAMUEL GOLDIN, KARL DIAMOND, HALA SOBOL, SAUL KLAUSNER and GOLDIE KNOBEL, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Respondents request that this Court deny the Petition for a Writ of Certiorari ("Pet.") filed by the Republic of Poland and the Ministry of State Treasury of the Republic of Poland ("Petitioners") to review the interlocutory decision of the United States Court of Appeals for the Second Circuit in this case in which the matter was remanded to the district court for the development of a factual record.

COUNTER-STATEMENT OF THE CASE

Respondents are individuals who are the rightful owners of properties that were taken by Petitioners beginning in 1956. They purport to represent a class of similarly-situated individuals, all of whom lost property as a result of conduct by Petitioners that targeted class members (or their recent ancestors) because they were Jews.

Petitioners' wrong-doing consisted of two steps. First, in the aftermath of World War II the Polish Communist Government organized and participated in mob violence aimed at Polish Jews who had survived the Holocaust. Hundreds were killed and tens of thousands were intimidated into fleeing the country. As a result, by 1948 few Jews lived in Poland.

Second, Poland enacted legislation pursuant to which properties were deemed "abandoned" and could be formally deeded to the state if the owners did not assert a claim within ten years. This legislation was specifically intended to divest the property rights of Polish Jews who had fled the country in fear of their lives.[1] Beginning ten years after the 1946 enactment of this property-abandonment statute – 1956 – and contin-

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[1] Respondents submitted an extensive analysis of the historical literature that supported their allegations to the district court.

uing to the current day, Petitioners simply deeded properties belonging to class members to themselves.

Respondents asserted several claims arising from these discriminatory takings. Petitioners successfully moved before the district court for an order dismissing the case on the ground that they were immune from suit in this country.[2] But the Second Circuit, in the order which is the subject of the instant Petition, vacated that decision in light of its ruling in *Abrams v. SNCF*[3] and remanded "for determinations of the Department of State's policy prior to the FSIA with respect to sovereign immunity for case[ ]."[4]

This was necessary so the parties could present and the court could consider evidence about whether Petitioners had settled expectations at the time of the takings that they could not be sued in a U.S. court for their wrong-doing, in which case the retroactive application of the Foreign Sovereign Immunities

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[2] *Garb v. Poland*, 207 F. Supp. 2d 16 (E.D.N.Y. 2002), *vacated by* No. 02-7844, 2003 U.S. App. LEXIS 16112, 2003 WL 21890843 (2d Cir. Aug. 6, 2003) (unpublished summary order), *petition for cert. filed*, 72 U.S.L.W. 3269 (U.S. Oct. 3, 2003) (No. 03-517). Petitioners moved on additional grounds that were not addressed by the district court.

[3] *Abrams v. Societe Natinale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3154 (U.S. Aug. 19, 2003) (No. 03-284) (distributed for conference on Nov. 7, 2003).

[4] Pet. App. A at 7a. The order also applied to *Whiteman v. Republic of Austria*, Nos. 02-9361 & 02-3087, *petition for cert. filed*, 72 U.S.L.W. 3268 (U.S. Sept. 30, 2003) (No. 03-500) (distributed for conference on Dec. 12, 2003).

Act,[5] or FSIA, might not be appropriate here.[6] If such a settled expectation did not exist, Respondents' case could proceed.

In *Abrams*, the Second Circuit surveyed four opinions from this Court – *Landgraf v. USI Film Products*,[7] *Hughes Aircraft Co. v. United States*,[8] *Lindh v. Murphy*,[9] and *I.N.S. v. St. Cyr*[10] – to derive what it labeled the "*Landgraf/Lindh* Framework" to be applied to determine whether a statute would apply retroactively to conduct that pre-dated its enactment.[11]

Applying this framework to the FSIA, it concluded that the statute did not expressly provide whether it was (or was not) to be applied retroactively and that "ordinary methods of statutory construction [did not] establish that the Act's jurisdictional provisions are inapplicable to the pre-enactment events here at issue."[12]

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[5] Chiefly 28 U.S.C. §§ 1602-1611 and 28 U.S.C. § 1330, but also amendments to 28 U.S.C. §§ 1332, 1391, and 1441. The Act was effective 90 days after its enactment on Oct. 21, 1976, i.e., Jan. 19, 1977. Pub. L. No. 94-583, § 8. 28 U.S.C. §§ 1602-1605 are set out at Pet. App. C.

[6] Pet. App. A at 6a-7a.

[7] 511 U.S. 244 (1994).

[8] 520 U.S. 939 (1997).

[9] 521 U.S. 320 (1997).

[10] 533 U.S. 289 (2001).

[11] *Abrams v. SNCF*, 332 F.3d at 180-84.

[12] *Id.* at 184-85. Respondents disagree. The FSIA's use of "henceforth" in section 1602 and the changes made in section 1330 strongly militate in favor of the express retroactivity of the FSIA. Further, State and Justice Department releases imply a contemporaneous understanding that the FSIA is retroactive.

Thus, under *Landgraf*, "the court must determine whether applying the statute to pre-enactment events 'would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,'" an inquiry ultimately "rooted in fundamental notions of fairness which dictate that 'settled expectations should not be lightly disrupted' and 'that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'"[13]

As a result, the Second Circuit in *Abrams* concluded, "[w]hat is called for is 'a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.'"[14]

Having reviewed the history of foreign sovereign immunity in the years before the FSIA was enacted in 1976, and particularly the case-by-case nature of the inquiry,[15] the Second Circuit concluded that "one crucial aspect of the pre-FSIA law and practice in the United States" was "the State Department's role in courts' foreign sovereign immunity determinations." But in *Abrams*, this factor had been "overlook[ed]" by the parties.[16] So the court of appeals simply remanded the case to the district court so that the parties could expand the record on

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[13] *Abrams v. SNCF*, 332 F.3d at 180-81 (quoting *Landgraf*, 511 U.S. at 280 and 265).

[14] *Id.* at 185 (quoting *I.N.S. v. St. Cyr*, 533 U.S. at 321).

[15] *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

[16] *Abrams v. SNCF*, 332 F.3d at 187. In contrast, Respondents here had presented some of these relevant considerations to the district court and the Second Circuit.

the issues of the State Department's position on "the significance of the corporate form" in the case and "whether the State Department would have recognized immunity in a case such as the one before us."[17] Only then could the district court decide whether the FSIA applied to the conduct before it, applying this Court's "framework" for analysis.

Abrams was decided after argument in this case (and *Whiteman v. Federal Republic of Austria*[18]). After requesting and receiving supplemental briefing on the impact of *Abrams*, the Second Circuit concluded that, "[f]aced with this development in the law of the Circuit since we heard oral argument in these matters, we remand for determinations of the Department of State's policy prior to the FSIA with respect to sovereign immunity for Poland . . . in the circumstances presented in . . . the instant case[ ]."[19] Only with that information before it can the district court decide what this Court said it must decide before applying (or not applying) the FSIA retroactively.

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[17] *Abrams v. SNCF*, 332 F.3d at 188. It seems difficult to correlate the existence of a "settled expectation of immunity" with a *post hoc* analysis of how the State Department might have acted at a particular time.

[18] Nos. 02-9361 & 02-3087, 2003 U.S. App. LEXIS 16112, 2003 WL 21890843 (2d Cir. Aug. 6, 2003) (unpublished summary order), *petition for cert. filed*, 72 U.S.L.W. 3268 (U.S. Sept. 30, 2003) (No. 03-500) (distributed for conference on Dec. 12, 2003). The same panel of the Second Circuit heard argument in both this case and *Whiteman* and issued a single summary order for both. Pet. App. A.

[19] Pet. App. A at 7a.

REASONS FOR DENYING THE WRIT

I. BECAUSE NEITHER THE COURT OF APPEALS NOR THE DISTRICT COURT HAVE DETERMINED THAT PETITIONERS DO NOT ENJOY IMMUNITY, IT IS PREMATURE FOR THIS COURT TO CONSIDER THIS CASE

The Second Circuit did no more in this case than remand for the development of the record. Thus, the legal issues relating to the retroactivity analysis are not yet ripe for determination. This Court should allow the record to be supplemented as the Second Circuit ordered before analyzing whether the FSIA should be applied retroactively.

Petitioners assert that they are compelled to bear a significant burden, and thus are stripped of the very immunity to which they feel themselves entitled.[20] But, of course, sovereign immunity is not self-created. The sovereign must, as Petitioners did here, move for the complaint's dismissal and in doing so must show that it is entitled to immunity. Here, the Second Circuit simply ruled that the district court did not have an adequate factual record to make the immunity determination.

Nor has the Second Circuit improperly converted a question of law into an issue of fact. Again, it has done no more than apply this Court's retroactivity jurisprudence to the particular statute before it, the FSIA. That the inquiry necessarily has a factual element – whether the sovereign had a reasonable expectation of immunity had suit been brought when the misconduct occurred – is of no moment.

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[20] Pet. at 9.

II. PETITIONERS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY FOR THE CONDUCT IN QUESTION

Central to Petitioners' argument, of course, is that they are entitled to absolute immunity; what the State Department or anyone would have thought when the takings took place is irrelevant.[21] But the issue, again derived from this Court's jurisprudence, is whether applying the FSIA "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[22]

The FSIA made no sea-change – from never to sometimes – as far as discriminatory expropriation is concerned. The Nuremberg Court[23] and the Tate Letters of 1949 and 1952 did that.[24] According to Congress, the statute "is not intended to affect the substantive law of liability."[25] Petitioners provide no

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[21] *See, e.g.*, Pet. at i (first Question Presented).

[22] *Landgraf*, 511 U.S. at 280.

[23] *See United States v. Goering*, 6 F.R.D. 69 (Int'l. Mil. Tribunal 1946).

[24] Letter of Jack B. Tate, Acting Legal Adviser of the State Dep't to Bennet, House & Couts, dated April 13, 1949 (1949 Tate Letter) *quoted in part at Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschippij*, 210 F.2d 375, 376 (2d Cir. 1954); Letter of Jack B. Tate, Acting Legal Adviser of the State Dep't to the Attorney General, May 19, 1952, 26 Dept. State Bull. 984-985 (1952), *reprinted at* Appendix 2 to *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976) (1952 Tate Letter).

[25] Foreign Sovereign Immunities Act of 1976, H.R. REP. No. 94-1487, 94th Cong. 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6610. *Compare* Pet. App. D at 76a (United States, as *amicus*, argues that "[t]he expropriation exception constituted a substantive change in the United

support for their claim to the contrary other than references to letters submitted by the United States in this action.[26] These letters did no more than rely on Second Circuit cases that noted among the "limited" circumstances in which a sovereign enjoyed immunity after the 1952 Tate Letter was "legislative acts, such as nationalization."[27]

But this is not a "nationalization" case. Poland did not take Respondents' properties because it was nationalizing all private property.[28] It took the properties to insure that the dispossessed Jews would not return and to allow Petitioners to

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States' practice concerning foreign sovereign immunity when it was adopted as part of the FSIA . . ..").

[26] Pet. at 9-10.

Petitioners say that "The Tate Letter did not purport to alter the law on sovereign immunity with regard to actions arising from expropriations and has no application to this case," Pet. at 5 n.3, but cite nothing for this assertion.

[27] *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964). *See Amicus* Brief of United States, Pet. App. D at 75a-76a (relying on, in addition to *Victory Transport*, *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971), and *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255, 259 (2d Cir. 1956)). While State also noted that this Court has cited *Victory Transport*, Pet. App. D at 76a, this Court has not expanded it to the level State suggests. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) (police-torture; quoting *Victory Transport*, 336 F.2d at 360, as identifying another post-Tate Letter area in which immunity was appropriate as "internal administrative acts").

[28] Communist Poland recognized private land ownership. *See* Doman, *Postwar Nationalization of Private Property in Europe*, 48 COLUM. L. REV. 1125, 1126 n.1 (1948).

profit from them. This conduct is not immune under the FSIA.[29] Nor was it immune after the Tate Letters.

III. THE SECOND CIRCUIT'S DECISION DOES NOT RAISE OR REFLECT A CIRCUIT-CONFLICT AND FOLLOWS ESTABLISHED PRINCIPLES FROM THIS COURT

Petitioners maintain[30] that what the Second Circuit did here creates a conflict among the D.C. Circuit's *Joo v. Japan*,[31] the Eleventh Circuit's *Jackson v. People's Republic of China*,[32] and *Altmann v. Republic of Austria* from the Ninth Circuit, on which the Court has granted a *cert.* petition.[33] Petitioners are mistaken. Unlike those cases, or *Abrams* and *Whiteman* and the even earlier Second Circuit opinion in *Carl Marks & Co. v. Union of Soviet Socialist Republics*,[34] the actionable conduct in this case occurred *after* the change in Poland's reasonable expectations caused by the Nuremberg Tribunal and the two Tate Letters.

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[29] 28 U.S.C. § 1605(a)(3) ("rights taken in violation of international law are in issue"), Pet. App. C at 54a.

[30] Pet. at 11-15.

[31] 332 F.3d 679 (D.C. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. ____ (U.S. Nov. 20, 2003).

[32] 794 F.2d 1490 (11th Cir. 1986).

[33] 317 F.3d 954 (9th Cir. 2002), *amended by* 327 F.3d 1246 (9th Cir.), *cert. granted* 124 S. Ct. 46 (2003) (limited to: "Does the expropriation exception of the [FSIA] afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?").

[34] 841 F.2d 26 (2d Cir. 1988).

Here, Respondents allege that the Polish State embarked upon a course of committing or abetting acts targeting Jews returning to their homes and businesses in the aftermath of World War II in an effort to rid itself of the significant presence of Jews that had characterized pre-1939 Poland. The purpose and effect of that conduct was the virtual elimination of Jews in Poland. After 1956, Poland took for itself the properties of the Jews that it deemed had been "abandoned."[35]

It was this latter conduct that gives rise to the claims here asserted. As to that conduct, there was no settled expectation on the part of Petitioners that they could acquire ownership of Jewish property through violent means as they did.

IV. THE UNIQUENESS OF THE FACTS IN THIS CASE MEAN THAT THERE ARE NO "RECURRING" QUESTIONS THAT THE COURT SHOULD CONSIDER AT THE EARLY STAGE OF THE CASE

Finally, Petitioners maintain that there are "important and recurring questions" present in this case that call for this Court's intervention and guidance.[36] But this case raises issues unlikely to arise in future: whether improper conduct of a sovereign that resulted in takings between the Tate Letters and the January 1977 effective-date of the FSIA is immune from being challenged in a U.S. court. Given the passage of time, it

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[35] The conduct occurred after 1952 because Poland did not deem property "abandoned" until its owner had been absent for 10 years after the passage of the relevant Polish law in 1946. The "abandonments" here, therefore, could not have occurred before the Tate Letters. Such discriminatory takings are outside the scope of the analysis by the Second Circuit here, or of the Questions Presented by Petitioners to this Court, *see* Pet. at i.

[36] Pet. at 15-17.

is likely that defenses such as the statute of limitations and laches would preclude most suits arising from pre-1949 or 1952 or even pre-1977 events. Thus while other cases concern pre-1949 or1952 conduct alone, several of them now before the Court,[37] this case does not.

Nor has the Second Circuit turned a deaf-ear to the purported position the State Department espoused.[38] In this case, State asserted, wrongly for the reasons set forth above,[39] no more than its view that as a general proposition property takings were absolutely immune before enactment of the FSIA. It provided no analysis that *under the facts of this case* Respondents could not have brought suit against Petitioners after their respective properties were taken in 1956 or thereafter. The Second Circuit here did no more than afford the parties the opportunity to explore this issue and present evidence to the district court on it, with an invitation to State to participate if it wished to.[40]

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[37] *E.g. Altmann v. Republic of Austria* (*cert.* granted), *Abrams v. SNCF, Whiteman v. Republic of Austria*, and *Joo v. Japan* (all *cert.* petition pending).

[38] Pet. at 15-17.

[39] *Supra* at 8-9.

[40] Pet. App. A at 7a-8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

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